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United States
Circuit Court of Appeals
For the Ninth Circuit.

REGINA MARTZ and A. J. MARTZ,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States
Board of Tax Appeals.

FILED

JAN 22 1935

PAUL P. O'BRIEN,
Clk. 100

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

W. W. WALLACE, Esq.,
C. F. HUTCHINS, Esq.

For Respondent:

EUGENE HARPOLE, Esq.,
ALVA C. BAIRD, Esq.,
M. B. LEMING, Esq.,
DEWITT EVANS, Esq.

Docket No. 53105

REGINA MARTZ,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES:

1931

- Feb. 24—Petition received and filed. Taxpayer notified. (Fee paid)
- Feb. 24—Copy of petition served on General Counsel.
- Apr. 2—Answer filed by General Counsel.
- Apr. 7—Copy of answer served on taxpayer—Circuit Calendar.

1933

- Aug. 3—Hearing set for week of Sept. 25, 1933, Long Beach, Calif.
- Sept. 25—Hearing had before Mr. Van Fossan, Division 9, on merits. Stipulation of facts filed. Briefs due Oct. 25, 1933—no exchange.
- Oct. 10—Transcript of hearing Sept. 25, 1933 filed.
- Nov. 10—Motion for extension of 30 days to file brief filed by taxpayer. Brief lodged by taxpayer.
- Nov. 13—Motion granted.
- Nov. 25—Motion for order to show cause why stipulation of facts should not be set aside filed by General Counsel.
- Dec. 1—Hearing set Dec. 20, 1933 on motion.
- Dec. 14—Motion to deny motion filed Nov. 25, 1933 filed by taxpayer (1).
- Dec. 20—Hearing had before Mr. Van Fossan, Division 9, on Commissioner's motion to set aside agreed statement of facts—motion held C. A. V.

1934

- Jan. 3—Transcript of hearing Dec. 20, 1933 filed.
- Feb. 17—Order that the agreed statement of facts be set aside and case be restored to circuit calendar for hearing in Los Angeles, Calif., entered.
- Mar. 30—Hearing set for week of 6/4/34, Beverly Hills, California.

1934

- June 8—Hearing had before Mr. Adams, Division 12, on merits—submitted. Petitioner's brief due July 9, 1934—Commissioner's brief due July 25, 1934.
- June 22—Transcript of hearing June 8, 1934 filed.
- July 5—Brief filed by taxpayer. 7/5/34 copy served.
- July 5—Motion to consolidate with docket 53106 filed by taxpayer. 7/26 34 granted. [1*]
- July 25—Brief filed by General Counsel.
- Aug. 9—Memorandum opinion rendered—Mr. Adams, Division 12. Decision will be entered for Commissioner.
- Aug. 13—Decision entered—Mr. Adams, Division 12.
- Oct. 20—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Nov. 3—Proof of service filed by taxpayer.
- Nov. 3—Praecipe filed by taxpayer—approved by General Counsel.
- Nov. 16—Motion to withdraw original exhibit and substitute photostat copy filed by General Counsel.
- Nov. 19—Motion of 11/16/34 granted.
- Dec. 6—Agreed statement of evidence lodged.
- Dec. 7—Agreed statement of evidence approved and ordered filed. [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

APPEARANCES:

For Petitioner:

W. W. WALLACE, Esq.,

C. F. HUTCHINS, Esq.

For Respondent:

EUGENE HARPOLE, Esq.,

ALVA C. BAIRD, Esq.,

M. B. LEMING, Esq.,

DEWITT EVANS, Esq.

 Docket No. 53106

A. J. MARTZ,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES:

1931

Feb. 24—Petition received and filed. Taxpayer notified. (Fee paid)

Feb. 24—Copy of petition served on General Counsel.

Apr. 2—Answer filed by General Counsel.

Apr. 7—Copy of answer served on taxpayer—Circuit Calendar.

1933

- Aug. 3—Hearing set for week of 9/25/33, Long Beach, California.
- Sept. 25—Hearing had before Mr. Van Fossan, on the merits. Stipulation of facts filed. Briefs due Oct. 25, 1933—no exchange.
- Oct. 10—Transcript of hearing Sept. 25, 1933 filed.
- Nov. 10—Motion for extension of 30 days to file brief, brief tendered, filed by taxpayer.
- Nov. 13—Motion granted.
- Nov. 25—Motion for order to show cause why stipulation of facts should not be set aside filed by General Counsel.
- Dec. 1—Hearing set Dec. 20, 1933 on motion.
- Dec. 14—Motion to deny motion filed Nov. 25, 1933 filed by taxpayer (1).
- Dec. 20—Hearing had before Mr. Van Fossan, Division 9, on Commissioner's motion to set aside agreed statement of facts—motion held C. A. V.

1934

- Jan. 3—Transcript of hearing Dec. 20, 1933 filed.
- Feb. 17—Order that agreed statement of facts be set aside and case be restored to circuit calendar for hearing in Los Angeles, Calif., entered.
- Mar. 30—Hearing set for week of June 4, 1934, Beverly Hills, Calif.

1934

- June 8—Hearing had before Mr. Adams, Division 12, on merits—submitted. Petitioner's brief due July 9, 1934—Commissioner's brief due July 25, 1934.
- June 22—Transcript of hearing June 8, 1934 filed.
- July 5—Brief filed by taxpayer. 7/5/34 copy served.
- July 5—Motion to consolidate with docket 53105 filed by taxpayer. 7/26/34 granted.
- July 25—Brief filed by General Counsel. [3]
- Aug. 9—Memorandum opinion rendered—Mr. Adams, Division 12. Decision will be entered for Commissioner.
- Aug. 13—Decision entered—Mr. Adams, Division 12.
- Oct. 20—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Nov. 3—Proof of service filed by taxpayer.
- Nov. 3—Praecipe filed by taxpayer—approved by General Counsel.
- Nov. 16—Motion to withdraw original exhibit and substitute photostat copy filed by General Counsel.
- Nov. 19—Motion of Nov. 16, 1934 granted.
- Dec. 6—Agreed statement of evidence lodged.
- Dec. 7—Agreed statement of evidence approved and ordered filed. [4]

United States Board of Tax Appeals

Docket No. 53105

REGINA MARTZ,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION:

The above named taxpayer hereby petitions for a redetermination of the deficiency in taxes, if any, as set forth in the Commissioner's Notice of Deficiency, dated January 10, 1931, (Copy attached), and as a basis of these proceedings, alleges as follows:

First: The petitioner is an individual residing in Los Angeles, California.

Second: The Deficiency Notice, a copy of which is attached hereto marked "Exhibit A", was mailed to the petitioner on or about January 10, 1931.

Third: The taxes in controversy are income taxes for the calendar year 1928 and are in the sum of \$5,496.20.

Fourth: The determination of the tax as set forth in the Notice of Deficiency, is based on the following errors: [5]

(a) The Commissioner has erred in failing to allow as a deduction the State Inheritance Taxes paid by petitioner, in the sum of \$213,521.58, prior

to the passage of the Revenue Act of 1928, and said payment having been made under and in conformity with all of the provisions of the Revenue Act of 1926, which was the law in force and effect when said payment was made.

(b) The Commissioner has erred in giving a narrow construction and interpretation to the provisions of Sec. 703, Revenue Act of 1928, in that he has ruled in effect that while the payment of the Inheritance Tax here in controversy was made under the provisions of the 1926 Revenue Act, that because the net income to be determined is under the Revenue Act of 1928, that said Section and the intent of Congress thereby does not apply.

(c) The Commissioner has erred in giving retroactive effect to any provision of the Revenue Act of 1928 which deprives the petitioner of a legal deduction for payments made under and by virtue of the Revenue Act of 1926, (Payment made May 10, 1928) said Revenue Act of 1926 being in force and effect when said payment by petitioner was made. The petitioner followed the law, to-wit: the Revenue Act of 1926, at the time of the making of payment of the Inheritance Tax to the State of California. At that time it was not known that the 1928 Act would be passed, nor was it known that it would be made retroactive to January 1st, 1928. Petitioner complied with the law as it existed at that time and petitioner contends that it was [6] not the purpose of the retroactive feature of the 1928 Act to inflict a burden on parties who had complied with the 1926 Act then in existence.

(d) The Commissioner has erred in failing to give effect to Sec. 703 of the Revenue Act of 1928 for the reason that the petitioner had paid \$213.-521.58 as State Inheritance Tax to the State of California on May 10, 1928, which sum was paid under the existing provisions of the Revenue Act of 1926 which provided that said deduction could only be taken by the heir (which petitioner was) and not by the administrator or executor of the estate, and the Commissioner has failed to give effect to said Section 703 which provides that if the deduction has been claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, and whereas the deduction was claimed by the beneficiary and was not claimed by the estate, and the Commissioner has refused and failed to follow the exceptions set forth in said Section 703 on the 1928 income tax account.

(e) The Commissioner has erred in failing to give effect to Section 703 of the 1928 Revenue Act which provides that if the Inheritance Tax has been paid and claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, whereas the Commissioner has disallowed the claim to the beneficiary after the tax has been paid by petitioner as such beneficiary and allowed said deduction only to the estate. [7]

Fifth: The facts upon which the petitioner relies as a basis for these proceedings are as follows:

(a) The laws of the State of California impose an Inheritance Tax upon the right to receive prop-

erty by bequest or devise. In such cases the Revenue Act of 1926 and the Regulations thereunder allowed as a deduction said payment of Inheritance Taxes by the beneficiary only. In the instant case the properties inherited were principally rental and income producing properties. The sole two heirs at law, not having the necessary funds to pay the Inheritance Taxes to the State of California, and desiring to pay said taxes individually as required by the 1926 Revenue Act, so that the deduction for same could be allowed them on their individual returns, had, after careful inquiry as to the requirements of said Revenue Act of 1926, a partial distribution of the income properties made to them so as to raise the money for the payment of the State Inheritance Taxes, and actually paid said taxes individually under the provisions of the 1926 Revenue Act, then in force and effect.

(b) Upon the passage of the Revenue Act of 1928, made retroactive to January 1, 1928 under Sec. 65 of said Act, the Congress passed and included a saving clause (Sec. 703), which was intended to clarify and allow as deductions for past payments to the one who actually paid the tax and so claimed it.

(c) In the instant case the petitioner paid the Inheritance Tax under the 1926 Act and in conformity therewith for the sole purpose of taking advantage of the law as it then existed. Had the estate paid the tax under the Act of 1926, [8] the estate could not claim the deduction under the

California rule. It is now proposed to deny the deduction to petitioner after he has complied with each step required by the existing law in force at that time (i. e. Revenue Act of 1926) by reason of the retroactive feature of the 1928 Act, (which was passed after said payment) and by denying the application of the saving clause intended by Sec. 703, Act of 1928.

Sixth: The petitioner herein, in support of his appeal, relies upon the following propositions of law:

(a) All of Section 214 Revenue Act of 1926, and Article 134, Regulation 69.

(b) All of Section 703 Revenue Act of 1928.

WHEREFORE, petitioner respectfully prays that this petition be placed upon the Field Calendar for hearing in Los Angeles, California, at an early date, and that this Board may hear and determine the correct tax due, if any, on this petition.

W. W. WALLACE

CHAS. F. HUTCHINS

Counsel for Petitioner

411-14 Central Building

Pasadena, California [9]

State of California,

County of Los Angeles.—ss.

REGINA MARTZ, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements con-

tained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

REGINA MARTZ

Subscribed and sworn to before me this 19th day of February, 1931.

[Notarial Seal]

GLADYS GILKS

Notary Public in and for the County of Los Angeles, State of California. [10]

EXHIBIT "A"

TREASURY DEPARTMENT

Washington

Jan. 10, 1931

Office of
 Commissioner of Internal Revenue
 Miss Regina Martz,
 C/o Charles F. Hutchins
 Central Building,
 Pasadena, California

Madam:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of \$5,496.20 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States

Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, which ever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner
By J. C. WILMER (Signed)
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870

[11]

STATEMENT

IT:AR:E-1

JE-60D

In re: Miss Regina Martz,
c/o Charles F. Hutchins,
Central Building,
Pasadena, California.

TAX LIABILITY

Year—1928.

Corrected Tax Liability—\$5,496.20.

Tax Previously Assessed—None.

Deficiency—\$5,496.20.

Reference is made to the report of the internal revenue agent in charge, Los Angeles, California, for the year 1928 and to your protest submitted June 25, 1930.

Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conference held with your representatives on August 18, 1930, in the office of the agent in charge. The adjustments recommended by the agent as the result of the conference have been approved by this office.

It was contended that the administrator followed the Revenue Act and Regulations in force at the time of the payment of the inheritance tax which was the Revenue Act of 1926, and since under the California law this tax is levied upon the right to receive, in accordance with the Revenue Act of

1926 the tax paid was deductible by the beneficiaries. It was further contended that the retroactive feature of section 703(a) (2) of the Revenue Act of 1928 when given the interpretation proposed by the revenue agent is in violation of the constitution and further that if the construction set forth by the administrator of section 703(a) (2) cannot be complied with, the entire net income from rents should be considered income to the estate and the deduction for taxes paid be deducted from the total net income.

Section 23(c) of the Revenue Act of 1928 provides that estate and inheritance tax shall be allowed as a deduction only to the estate. Section 53(a) states that returns made on the calendar year shall be made on or before the fifteenth day of March following [12] the close of the calendar year, and under this provision the 1928 returns are governed by the Revenue Act of 1928 which was effective January 1, 1928, as provided in section 65 of the Act. Under the existing law this office has no prerogative other than to tax the income from assets distributed in 1928 to the distributees and to allow the estate the deduction for inheritance taxes.

The adjustments in your tax liability are indicated below:

| | | |
|----------------------------------|--------------------|--------------|
| Net income reported on return | Loss | \$160,183.45 |
| Add: | | |
| 1. Inheritance tax disallowed | | 213,521.59 |
| | | <hr/> |
| Total | | \$ 53,338.13 |
| Deduct: | | |
| 2. Depreciation | | 1,536.31 |
| | | <hr/> |
| Net income adjusted | | \$ 51,801.82 |
| | Computation of Tax | |
| Net income adjusted | | \$ 51,801.82 |
| Less: | | |
| Personal exemption | | 1,500.00 |
| | | <hr/> |
| Net income subject to normal tax | | \$ 50,301.82 |
| Normal tax at 1½% on \$4,000.00 | | \$ 60.00 |
| Normal tax at 3% on \$4,000.00 | | 120.00 |
| Normal tax at 5% on \$42,301.82 | | 2,115.09 |
| Surtax on \$51,801.82 | | 3,214.24 |
| | | <hr/> |
| Total Tax | | \$ 5,509.33 |
| Less: | | |
| Earned income credit | | 13.13 |
| | | <hr/> |
| Tax assessable | | \$ 5,496.20 |
| Tax previously assessed | | none |
| | | <hr/> |
| Deficiency | | \$ 5,496.20 |
| | | [13] |

Explanation of Changes

1. As explained above.
2. Depreciation has been allowed at the rate of $3\frac{1}{3}\%$ on the property owned except in the case of the $2\frac{1}{2}$ story brick building in which case 4% has been allowed. No depreciation has been allowed on the frame flats as depreciation taken in 1927 exhausted the cost.

[Endorsed]: Filed Feb. 24, 1931. [14]

[Title of Court and Cause—Docket No. 53105.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

- (1) Admits the allegations of the First paragraph of the petition.
- (2) Admits the allegations of the Second paragraph of the petition.
- (3) Admits the allegations of the Third paragraph of the petition.
- (4) Denies the respondent erred in the determination of the deficiency as alleged in subparagraphs (a) to (e), inclusive, of the Fourth paragraph of the petition.
- (5) Denies the allegations of fact contained in subparagraphs (a) to (e), inclusive, of the Fifth paragraph of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals.
Filed April 2, 1931. [15]

[Title of Court and Cause—Docket No. 53106.]

PETITION

The above named taxpayer hereby petitions for a redetermination of the deficiency in taxes, if any, as set forth in the Commissioner's Notice of Deficiency, dated January 10, 1931, (copy attached) and as a basis of these proceedings, alleges as follows:

First: The petitioner is an individual residing in Los Angeles, California.

Second: The Deficiency Notice, a copy of which is attached hereto marked "Exhibit A", was mailed to the petitioner on or about January 10, 1931.

Third: The taxes in controversy are income taxes for the calendar year 1928 and are in the sum of \$14,581.35.

Fourth: The determination of the tax as set forth in the Notice of Deficiency, is based on the following errors: [16]

(a) The Commissioner has erred in failing to allow as a deduction the State Inheritance Taxes paid by petitioner, in the sum of \$213,521.58, prior to the passage of the Revenue Act of 1928, and said payment having been made under and in conformity with all of the provisions of the Revenue Act of 1926, which was the law in force and effect when said payment was made.

(b) The Commissioner has erred in giving a narrow construction and interpretation to the provisions of Sec. 703, Revenue Act of 1928, in that he has ruled in effect that while the payment of the inheritance tax here in controversy was made under the provisions of the 1926 Revenue Act, that because the net income to be determined is under the Revenue Act of 1928, that said Section and the intent of Congress thereby does not apply.

(c) The Commissioner has erred in giving retroactive effect to any provision of the Revenue Act of 1928 which deprives the petitioner of legal deduction for payments made under and by virtue of the Revenue Act of 1926, (Payment made May 10, 1928) said Revenue Act of 1926 being in force and effect when said payment by petitioner was made. The petitioner followed the law, to-wit: the Revenue Act

of 1926, at the time of the making of payment of the Inheritance Tax to the State of California. At that time it was not known that the 1928 Act would be passed, nor was it known that it would be made retroactive to January 1st, 1918. Petitioner complied with the law as it existed at that time and petitioner contends that it was not the purpose of the retroactive feature of the 1928 Act to inflict a burden on parties who had complied with the 1926 Act then in existence. [17]

(d) The Commissioner has erred in failing to give effect to Sec. 703 of the Revenue Act of 1928 for the reason that the petitioner had paid \$213,-521.58 as State Inheritance Tax to the State of California on May 10, 1928, which sum was paid under the existing provisions of the Revenue Act of 1926, which provided that said deduction could only be taken by the heir (which petitioner was) and not by the administrator or executor of the estate, and the Commissioner has failed to give effect to said Section 703 which provides that if the deduction has been claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, and, whereas the deduction was claimed by the beneficiary and was not claimed by the estate, and the Commissioner has refused and failed to follow the exceptions set forth in said Section 703 on the 1928 income tax account.

(e) The Commissioner has erred in failing to give effect to Section 703 of the 1928 Revenue Act which provides that if the inheritance tax has been

paid and claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary, whereas the Commissioner has disallowed the claim to the beneficiary after the tax has been paid by petitioner as such beneficiary and allowed said deduction only to the estate.

Fifth: The facts upon which the petitioner relies as a basis for these proceedings are as follows:

(a) The laws of the State of California impose an inheritance tax upon the right to receive property by bequest or devise. In such cases the Revenue Act of 1926 and the Regula- [18] tions thereunder allowed as a deduction said payment of inheritance taxes by the beneficiary only. In the instant case the properties inherited were principally rental and income producing properties. The sole two heirs at law, not having the necessary funds to pay the inheritance taxes to the State of California, and desiring to pay said taxes individually, as required by the 1926 Revenue Act, so that the deduction for the same could be allowed them on their individual returns, had, after careful inquiry as to the requirements of said Revenue Act of 1926, a partial distribution of the income properties made to them so as to raise the money for the payment of the State Inheritance Taxes, and actually paid said taxes individually under the provisions of the 1926 Revenue Act, then in force and effect.

(b) Upon the passage of the Revenue Act of 1928, made retroactive to January 1, 1928, under Sec. 65 of said Act, the Congress passed and in-

In accordance with Section 72 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner,

By J. C. WILMER,

Deputy Commissioner.

Enclosures:

Statement

Form 882

Form 870 [22]

STATEMENT

IT:AR:E-1
JE-60D

In re: Mr. A. J. Martz,
c/o Charles F. Hutchins,
Central Building,
Pasadena, California.

TAX LIABILITY

Year—1928

Corrected Tax Liability—\$14,581.53

Tax Previously Assessed—None

Deficiency—\$14,581.53

Reference is made to the report of the internal revenue agent in charge, Los Angeles, California, for the year 1928 and to your protest submitted June 25, 1930.

Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conference held with your representatives on August 18, 1930 in the office of the agent in charge. The adjustments recommended by the agent as the result of the conference have been approved by this office.

It was contended that the administrator followed the Revenue Act and Regulations in force at the time of payment of the inheritance tax which was the Revenue Act of 1926 and since under the California law this tax is levied upon the right to receive, in accordance with the Revenue Act of 1926

the tax paid was deductible by the beneficiaries. It was further contended that the retroactive feature of section 703(a)(2) of the Revenue Act of 1928 when given the interpretation proposed by the revenue agent is in violation of the constitution and further that if the construction set forth by the administrator of section 703(a)(2) cannot be complied with the entire net income from rents should be considered income to the estate and the deduction for taxes paid be deducted from the total net income.

Section 23(c) of the Revenue Act of 1928 provides that estate and inheritance tax shall be allowed as a deduction only to the estate. Section 53(a) states that returns made on the calendar year shall be made on or before the fifteenth day of March following the close of the calendar year, and under this provision the 1928 returns are governed by the Revenue Act of 1928 which was effective January 1, 1928 as provided in section 65 of the Act. Under the existing law this office has no prerogative other than to tax the income from assets distributed in 1928 to the distributees and to allow the estate the deduction for inheritance taxes. [23]

The adjustments in your tax liability are indicated below:

| | | |
|-------------------------------------|-----------|--------------|
| Net income reported on return | Loss | \$116,137.91 |
| Add: | | |
| 1. State inheritance tax disallowed | | 213,521.58 |
| | | <hr/> |
| Total | | \$ 97,383.67 |
| Deduct: | | |
| 2. Interest | \$ 398.20 | |
| 3. Depreciation | 1,869.68 | 2,267.91 |
| | <hr/> | <hr/> |
| Net income adjusted | | \$ 95,115.76 |

Computation of Tax

| | | |
|----------------------------------|--|--------------|
| Net income adjusted | | \$ 95,115.76 |
| Less: | | |
| Personal Exemption | | 3,900.00 |
| | | <hr/> |
| Net income subject to normal tax | | \$ 91,215.76 |
| Normal tax at 1½% on \$4,000.00 | | \$ 60.00 |
| Normal tax on 3% on \$4,000.00 | | 120.00 |
| Normal tax at 5% on \$83,215.76 | | 4,160.79 |
| Surtax on \$95,115.76 | | 10,731.99 |
| | | <hr/> |
| Total tax | | \$ 15,072.78 |
| Less: | | |
| Earned income credit | | 491.25 |
| | | <hr/> |
| Tax assessable | | \$ 14,581.53 |
| Tax previously assessed | | None |
| | | <hr/> |
| Deficiency | | \$ 14,581.53 |

Explanation of changes

1. Explained above.
2. Interest reported on the return of your sister has been eliminated in your return of income. [24]

Explanation of Changes

(Continued)

3. Depreciation has been allowed at the rate of 3-1/3% on the property owned except in the case of the 2 1/2 story building and the frame and concrete residence in which cases 4% has been allowed as reasonable rate of depreciation. No depreciation has been allowed on the frame flats as depreciation taken in 1927 exhausted the cost.

[Endorsed]: Filed Feb. 24, 1931. [25]

[Title of Court and Cause—Docket No. 53106.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

- (1) Admits the allegations of the First paragraph of the petition.
- (2) Admits the allegations of the Second paragraph of the petition.
- (3) Admits the allegations of the Third paragraph of the petition.

(4) Denies the respondent erred in the determination of the deficiency as alleged in subparagraphs (a) to (e), inclusive, of the Fourth paragraph of the petition.

(5) Denies the allegations of fact contained in subparagraphs (a) to (c), inclusive, of the Fifth paragraph of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals.
Filed April 2, 1931. [26]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

W. W. Wallace, Esq., for the petitioners.

Dewitt Evans, Esq., for the respondent.

MEMORANDUM OPINION.

ADAMS: These cases involve income tax liability. They were consolidated for hearing and decision.

The petitioners request redetermination of deficiencies asserted against them for the year 1928.

The facts are not in dispute. Petitioners are the heirs of Elizabeth Martz who died November 20, 1927. Her estate was pending in 1928. On May 10, 1928, petitioner A. J. Martz, as administrator of his mother's estate, paid \$427,043.16 inheritance taxes to the State of California out of the funds of the estate. On May 29, 1928, partial distribution of the estate was made to the petitioners as distributees, which estate consisted of income producing real estate. The hearing on the petition for partial distribution [27] and the order were as of May 29, 1928, at 2:00 o'clock P.M. and the order was filed May 31, 1928. The income from the real estate so distributed to the petitioners amounted to approximately \$21,000 per month. The petitioners in their individual income tax returns for the year 1928, filed in March 1929, each claimed as deduction one-half of the inheritance tax paid by the estate which amounted to \$213,521.58, each. A. J. Martz, as administrator of the estate, in the income tax return of the estate for the year 1928, did not take the amount of the inheritance tax as a deduction. The respondent disallowed these amounts as deductions from the income of the petitioners.

In the 60-day letter addressed to the petitioners, the respondent among other things said: "Under the existing law, this office has no prerogative other than to tax the income from assets distributed in 1928 to the distributees and to allow the estate the

deduction for inheritance taxes.”

The petitioners contend that under the provisions of Section 703 of the Revenue Act of 1928 that the deduction claimed by them as beneficiaries should have been allowed to them by the respondent and not to the estate.

Section 23-C of the Revenue Act of 128 provides:

“* * * For the purpose of this subsection, estate, inheritance, legacy, and succession taxes accrue on the due date thereof, except as otherwise provided by the law of the jurisdiction imposing such taxes, and shall be allowed as a deduction only to the estate. * * *”

Section 65 of the Revenue Act of 1928 provides:

“This title shall take effect as of January 1, 1928. * * *”

Under provisions of the statute, the action of the Commissioner in disallowing the deductions claimed by the petitioners was correct. There seems [28] to be no doubt as to the constitutionality of the act insofar as these provisions are concerned.

In the case of *Elmon C. Gillette v. Commissioner*, 29 B. T. A. 561, we had before us the same question which is presented here. The holding in that case disposes of all questions presented on this appeal adversely to the contentions of the petitioners.

The determination of the respondent is approved.

Enter:

Decision will be entered for the respondent.

[Endorsed]: Entered Aug. 9, 1934. [29]

United States Board of Tax Appeals
Washington

Docket No. 53105

REGINA MARTZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion, entered August 9, 1934, it is

ORDERED and DECIDED: That there is a deficiency of \$5,496.20 for the year 1928.

Enter:

[Seal]

(s) JED C. ADAMS

Member.

Entered: Aug. 13, 1934. [30]

United States Board of Tax Appeals
Washington

Docket No. 53106

A. J. MARTZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion, entered August 9, 1934, it is

ORDERED and DECIDED: That there is a deficiency of \$14,581.53 for the year 1928.

Enter:

[Seal]

(s) JED C. ADAMS

Member.

Entered: Aug. 13, 1934. [31]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

PETITION OF THE TAXPAYERS FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, OF A DECISION BY THE UNITED STATES BOARD OF TAX APPEALS.

Taxpayers, the petitioners under Docket Nos. 53105 and 53106, in this cause, which were duly

consolidated for hearing and decision by the Board, by W. W. Wallace and Chas. F. Hutchins, counsel, hereby file their petition for review by the United States Circuit Court of Appeals, Ninth Circuit, of the decisions by the United States Board of Tax Appeals rendered on August 13, 1934, determining deficiencies in each of the petitioners Federal income taxes for the calendar year 1928, in the sum of \$5,496.20 as to Regina Martz and in the sum of \$14,581.53 as to A. J. Martz, and respectfully shows: [32]

I.

The petitioners are residents of the City of Los Angeles, State of California, and therefore, pursuant to the provisions of Section 1002 of the Revenue Act of 1932 and 1934 as amended, request that the aforesaid decision of the Board of Tax Appeals may be reviewed by the United States Circuit Court of Appeals, Ninth Circuit.

II.

NATURE OF CONTROVERSY.

This controversy involves a proper determination of the liability of each of the petitioners for Federal income taxes for the calendar year 1928.

The petitioners are the only children of Elizabeth Martz, who died November 30th, 1927.

A. J. Martz, the son, was appointed administrator of his mother's estate.

On May 10, 1928, he paid to the State of California inheritance taxes due from himself and his

sister upon their inheritance the sum of \$427,043.16. Practically all of the inherited property was situated in the downtown district of the City of Los Angeles.

The Petition for Partial Distribution was filed by petitioners on May 12, 1928. Thereafter, and on May 29, 1928, a Decree of Partial Distribution was made in the Estate of Elizabeth Martz wherein there was distributed to petitioners practically all of the income-producing property in this estate. This was done so that each of the petitioners would receive the income thereafter during that calendar year. It was their purpose to deduct the above mentioned inheritance taxes paid by them [33] from their gross income. Said gross income being the rents from the property distributed to them on May 29, 1928.

At that time, under the Revenue Act of 1926 then in force and effect, and, in some instances, under the 1928 Revenue Act later passed, these inheritance taxes were deductible by the heirs.

The income on the real estate distributed on May 29, 1928, amounted to about \$21,000. per month.

Each of the petitioners was liable for one half of the aforementioned inheritance tax, or the sum of \$213,521.58, as the law of California bases the tax upon property received.

At the time of the payment of the said inheritance tax on May 10, 1928, neither of the petitioners had any knowledge or information as to any changes in the Revenue Act with relation to deductions of

taxes paid but on the other hand made inquiry at the local Collector's offices as to the proper procedure in order to take advantage of the inheritance taxes paid as a proper deduction for income tax purposes. Following the information furnished by the said Collector's office that the inheritance tax paid to the State of California, by residents thereof, was only allowed as a deduction to the one upon whom the tax was imposed, the petitioners herein secured the partial distribution mentioned as of May 29, 1928, and in filing their income tax returns for the year 1928 they claimed as a deduction, under Section 214-(a) (3); Revenue Act of 1926, the inheritance taxes disallowed herein by the Respondent. [34]

Upon the passage of the Revenue Act of 1928 Section 23 provided for the deduction of inheritance taxes by the estate.

Section 703 of the 1928 Revenue Act provides that in determining the net income of an heir, devisee, legatee, distributee, or beneficiary, the amount of estate, inheritance, legacy, or State inheritance taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:

1. If the deduction has been claimed by the estate but not by the beneficiary, it shall be allowed to the estate.

2. If the deduction has been claimed by the beneficiary but not by the estate, it shall be allowed to the beneficiary.

The deduction was claimed by the beneficiaries (the petitioners herein), and not by the estate. Petitioners herein complied with the laws and regulations in force at the time of payment of the inheritance tax, and took the deduction in good faith on their 1928 income tax return.

The Commissioner of Internal Revenue held that the inheritance taxes paid could only be claimed by the estate and denied the deduction as claimed by the two heirs at law in their individual returns for the year 1928.

III.

The petitioners, being aggrieved by the findings and opinion of the Board, and by its decision entered pursuant thereto, desire to obtain a review thereof by the United States Circuit Court of Appeals, Ninth Circuit. [35]

IV.

ASSIGNMENTS OF ERROR.

The petitioners assign as error the following acts and omissions of the United States Board of Tax Appeals:

(1) The failure to allow as a deduction from each of the petitioners gross income for the year 1928 the inheritance taxes paid on May 10, 1928, to the State of California, while the 1926 Revenue Act was still in force and effect.

(2) The failure to find that Section 703, Revenue Act of 1928, allows the deduction claimed the

distributees of the estate when claimed by them in their return and not claimed by the estate.

(3) The finding of deficiencies for the year 1928 in lieu of a determination that there is no additional income tax due from either of the petitioners herein for the year 1928.

W. W. WALLACE

CHAS. F. HUTCHINS

Counsel for Petitioners

404 Higgins Building

Los Angeles, California [36]

State of California,
County of Los Angeles.—ss.

W. W. Wallace, being first duly sworn, says that he is counsel of record in the above-named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the foregoing petition and is familiar with the statements contained therein; and that the statements made are true to *be* best of his knowledge, information and belief.

W. W. WALLACE

Subscribed and sworn to before me this 14 day of October, 1934.

[Seal]

GLADYS GILKS,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Oct. 20, 1934. [37]

[Title of Court and Cause—Nos. 53105-53106.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above entitled cases. These cases came on for hearing before the Honorable Jed C. Adams, Member of the United States Board of Tax Appeals, on June 8, 1934. W. W. Wallace, Esq., appeared for the petitioners and DeWitt M. Evans, Special Attorney, Bureau of Internal Revenue, appeared for the respondent.

AUGUST J. MARTZ,

being first duly sworn, was called as a witness on behalf of the petitioners and testified as follows:

Direct Examination.

I am one of the petitioners. Regina Martz is my sister. My mother was Elizabeth Martz, who died in November, 1927. In the month of May, 1928, I paid the inheritance tax levied and assessed by the State of California to the County Treasurer of this County. [38]

At this point there was offered and received in evidence as PETITIONER'S EXHIBIT 1, a receipt which reads as follows:

(Testimony of August J. Martz.)

Triplicate (for person paying tax)

No. 11889.

Office of the Treasurer of Los Angeles
County, State of California.

Receipt for Inheritance or transfer tax upon
property passed from Elizabeth Martz, de-
ceased, who died Nov. 30, 1927.

Received of August J. Martz, administrator
of the estate of the above-named deceased, the
sum of Four hundred twenty-seven thousand
forty three and 16/100 Dollars, being the
amount of the inheritance or transfer tax due
the State of California under the provisions of
the inheritance or transfer tax laws of said
state upon the following gifts, legacies, inheri-
tances, bequests, successions and transfers as
determined and fixed by an order of the Su-
perior Court of the above-named county, in the
matter of the estate of the above-named de-
ceased,

Heretofore)

to be hereafter) duly made and entered therein.

Value of

| Name Relationship | Property Received | Tax |
|---|-------------------|------------|
| | #92490 | |
| Payment on account | | 449,519.12 |
| Amount of Tax | | 449,519.12 |
| Amount of rebate (if paid within six months) | | 22,475.96 |

(Testimony of August J. Martz.)

Amount of interest (at seven per cent)

Amount of interest (at ten per cent)

Amount due STATE 427,043.16

Countersigned 19..... Dated 5-10 1928

Controller of State

By.....

Deputy.

(stamped) H. L. BYRAM
County Treasurer

By /sgd/ R. CROSSMAN
Deputy Treasurer. [39]

There was then offered and received in evidence certificate dated June 6, 1934, of L. E. Lampton, County Clerk by Mary Frye, Deputy, as PETITIONER'S EXHIBIT 2.

PETITIONER'S EXHIBIT 2

Admitted in Evidence June 8, 1934

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

CERTIFICATE OF COUNTY CLERK.

State of California,

County of Los Angeles.—ss.

L. E. LAMPTON, County Clerk of Los Angeles County, California, and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, does hereby certify:

(Testimony of August J. Martz.)

That there was pending in the Probate Department of the County Clerk's office a certain probate matter entitled "In the Matter of the Estate of Elizabeth Martz, deceased," which probate number was 92490, probate records of the said office.

That the undersigned County Clerk is the custodian of the said records, and that there appears among the files in the papers of the said estate a Petition for Partial Distribution which was filed with the papers of the said estate in the undersigned's office on the 12th day of May, 1928. [43]

That, upon the filing of the said Petition, the same was set for hearing before the court on May 29th, 1928, at two o'clock p. m. That on the date last mentioned, said Petition for Partial Distribution was heard, was granted by the court, and an order was made and entered distributing the properties referred to in the said Petition to August Martz and Regina Martz.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 6th day of June, 1934.

L. E. LAMPTON, County Clerk,
 [Seal] By (s) MARY FRYE,
 Deputy. [44]

The witness further testified as follows:

I was present in court on the 29th day of May, 1928, when the petition for partial distribution was

(Testimony of August J. Martz.)

granted. The properties mentioned in that petition produced revenue. My sister and I received that joint revenue.

“Q. For the calendar year 1928 did you file an income tax return?

A. We did.

Q. In March, 1929?

A. We did.

Q. In that return did you claim as a deduction one half of the taxes that were paid, as shown by this receipt?

A. Yes.

Q. I will ask you if one half of that sum that is shown by that receipt was on your inheritance from your mother.

A. Yes.

Q. Who was the administrator of that estate, Mr. Martz?

A. I was the administrator.

Q. As such administrator and for the calendar year did you file an income tax return in March, 1929?

A. For the estate.

Q. Yes. Included in that was the income you had received as administrator, was it?

A. It was.

Q. In the return so filed by you did you claim any deduction [40] on account of this inheritance tax that you and your sister had paid?

A. No, sir.

(Testimony of August J. Martz.)

Q. You did not?

A. No.”

Cross Examination

The \$427,000.00, taxes paid for this estate, was paid out from the estate. The check was signed by me as administrator, on the funds of the estate.

“Q. Did you pay an income tax for the year 1928?

A. No. You mean as an individual?

Q. Yes, sir, as an individual.

A. No, we did not have to, after taking the deduction that I understood we were allowed under the law.”

I do not recall whether or not my sister paid any income tax. The properties that I received from the estate consisted of real property. It was income producing property. The income received by both my sister and myself during 1928 from these properties, after the partial distribution, was about \$21,000.00 a month. This property was finally distributed equally to me and to my sister, and the income was divided equally.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the petitioner on review.

CHARLES F. HUTCHINS

W. W. WALLACE

Attorneys for Petitioners on Review. [41]

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

ROBERT H. JACKSON

Assistant General Counsel for the
Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of this record, this statement of evidence is duly approved and settled this 7th day of Dec., 1934.

(s) JED C. ADAMS

Member, United States Board
of Tax Appeals.

[Endorsed]: Filed Dec. 7, 1934. [42]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Cir-

cuit Court of Appeals, Ninth Circuit, with reference to petition for review heretofore filed by the petitioners in the above named cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition of redetermination

(b) Answer of Respondent

(c)

(3) The memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioners in the above cause.

(6) The statement of the evidence with all exhibits attached thereto.

(7) This praecipe.

J. WISEMAN MACDONALD

W. W. WALLACE

CHAS. F. HUTCHINS

Attorneys for Petitioners.

[Endorsed]: Filed Nov. 3, 1934. [45]

[Title of Court and Cause—Docket Nos. 53105 and 53106.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 45, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of Dec., 1934.

[Seal]

B. D. GAMBLE,

Clerk,

United States Board of Tax Appeals.

[Endorsed]: No. 7723. United States Circuit Court of Appeals for the Ninth Circuit. Regina Martz and A. J. Martz, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed December 28, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

